Petition

81-576

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In the Supreme Court of the United States

October Term, 1981

ELOISE A. JACOBS,
Petitioner,

V.

COLLEGE OF WILLIAM AND MARY,
etc., et al,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

a) May a jury verdict be set aside where the evidence and inferences conflict?

b) What is the employee's burden of proof in an age discrimination case?

c) Is "comparable worth" an issue in an equal pay action?

d) May a college create a property interest in a job by providing for advance notice of termination?

e) Is a public official immune from damages under 42 U.S.C. § 1983 unless he acted in bad faith?

INDEX

	Page
1. Material Proceedings and Opinions Below.....	2
2. Jurisdiction.....	5
3. The Questions Presented for Review.....	6
4. Pertinent References.....	6
5. Statement of the Case and Material Facts.....	7
6. Reasons for Granting the Writ.....	22
Argument.....	22
Conclusion.....	29
Certificate.....	30
Appendix A..... Opinion and Order of Judge J. Calvitt Clarke, United States District Court	A.1
Appendix B..... Opinion and Order of Chief Judge Richard B. Kellam, United States District Court	A.30
Appendix C..... unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit	A.83

Appendix D..... A.86
Pertinent References

TABLE OF CITATIONS

Cases

	Page
Continental Co. v. Union Carbide, 370 U.S. 690, 696, 700-701, 82 S. Ct. 1404, 8 L.Ed. 2d 777 (1962)	22
County of Washington v. Gunther, 49 L.W. 4623 (June 8, 1981)	26
Gallick v. Galtimore & Ohio R. Co., 372 U.S. 108, 83 S. Ct. 659, 9 L.Ed. 2d 618 (1963)	22-23
Laugesen v. Anaconda Company, 510 F.2d 307 (6th Cir. 1975)	25
Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980) cert.den. 101 S. Ct. 244	27
Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)	24, 25, 26
Smith v. Flax, 618 F.2d 1062 (4th Cir. 1981)	23
Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981)	26
Texas Dept. of Community Affairs v. Burdine, 67 L.Ed 2d 207 (1981)	23
United States v. Caceres, 440 U.S. 741, 752-53 (1979)	28

Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992, 43 L.Ed. 2d 214 (1975)..... 28

United States Constitution

Amendment XIV..... 6

Statutes

Title 28 U.S.C. § 1254(1)..... 6

Title 28 U.S.C. § 2101(c)..... 5

Title 29 U.S.C. § 206(d)(1)..... 3,6,7

Title 29 U.S.C. § 621 et seq..... 3,7

Title 29 U.S.C. § 623(a)(1)..... 3,6

Title 42 U.S.C. § 1983..... 4,6,7,28

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SUPREME COURT OF THE UNITED STATES
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ELOISE A. JACOBS,

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v.

COLLEGE OF WILLIAM AND MARY,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Petitioner Eloise A. Jacobs prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 19, 1981.

1. Material Proceedings and Opinions Below

The Petitioner, Eloise A. Jacobs, was employed by the respondent, College of William and Mary, from 1974 through June, 1978, in the Women's Department of Physical Education in various capacities including teaching, Director of Women's Intramurals and Women's Varsity Basketball Coach. The Respondent, Mildred B. West,[1] was head of the Department.

In the Spring of 1978, the College undertook to fill several positions in the Department, including that occupied by Mrs. Jacobs, i.e. Women's Varsity Basketball Coach; however, after applying for this position, along with other applicants, she was not selected.

Believing that she was a victim of age discrimination, Mrs. Jacobs (who was

[1]The Respondent, Mildred B. West, is the only remaining party not named in the caption.

then forty years of age), filed a complaint with the United States Department of Labor pursuant to the Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.).

Following the administrative proceedings, Mrs. Jacobs filed a.. action containing three counts in the United States District Court for the Eastern District of Virginia on December 12, 1979 against the College, Mrs. West and Thomas A. Graves, Jr., its President.

Count One alleged sex discrimination in that she was paid considerably less than her male counterparts for equivalent work (29 U.S.C. § 206 (d)(1)).

Count Two alleged age discrimination in that she was not selected for the position of Women's Varsity Basketball Coach because of her age (29 U.S.C. § 623(a)(1)).

Count Three alleged that she was denied due process in notbeing given twelve

months notice of her termination as required by the College Faculty Handbook (42 U.S.C. § 1983).

Following a Motion for Summary Judgment, the District Court (Judge J. Calvitt Clarke) entered an order dismissing the College as a defendant in Count Three on the grounds it is an arm of the state, but directing that the matter proceed as to the individual defendants (Appendix A).

The matter was tried to a Jury (the Hon. Richard B. Kellam, Chief Judge, presiding) and the Jury returned a verdict in favor of Mrs. Jacobs on Count One against the College in the amount of $51,200.00; on Count Two against the College in the amount of $10,000.00; and, on Count Three against Mildred B. West, individually, in the amount of $10,000.00.

The District Court entered Judgment on the Verdict and the College and Mrs. West moved for Judgment Notwithstanding

the Verdict or, in the Alternative, for a new trial. Mrs. Jacobs moved for an award of attorney's fees.

By Opinion and Order dated December 15, 1980, the District Court (Chief Judge Richard B. Kellam) set aside the verdict of the Jury, vacated the Judgment previously entered thereon, and entered Judgment for the College and Mrs. West (Appendix B).

Petitioner appealed the Judgment of District Court to the United States Court of Appeals for the Fourth Circuit, which affirmed the Judgment by an unpublished per curiam opinion, No. 81-1124, decided June 19, 1981 (Appendix C).

2. Jurisdiction

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on the 19th day of June, 1981. This petition follows within 90 days thereof (28 U.S.C. § 2101(c)). Jurisdiction is

invoked pursuant to 28 U.S.C. § 1254(1).

3. The Questions Presented for Review

a) May a jury verdict be set aside where the evidence and inferences conflict?

b) What is the employee's burden of proof in an age discrimination case?

c) Is "comparable worth" an issue in an equal pay action?

d) May a college create a property interest in a job by providing for advance notice of termination?

e) Is a public official immune from damages under 42 U.S.C. § 1983 unless he acted in bad faith?

4. Pertinent References

a) Amendment XIV of the United States Constitution

b) 29 U.S.C. § 206(d)(1)

c) 29 U.S.C. § 623(a)(1)

d) 42 U.S.C. § 1983 (prior to 1979 Amendment)

See Appendix D for verbatim citation of cases.

5. Statement of the Case and Material Facts

The basis for Federal Jurisdiction in the District Court is 29 U.S.C. §§ 206(d)(1), 621 et seq; and 42 U.S.C. § 1983.

All references are to the Joint Appendix filed as part of the record in the Fourth Circuit, and shall refer first to the volume thereof, then the page, e.g. (A. Vol. I - p. 3).

Mrs. Jacobs, aged 40, has a Bachelor's Degree from Louisiana State University and a Master's Degree from the College of William and Mary. She was an outstanding athlete in basketball and other sports in high school and college, e.g. swimming, archery and bowling (A. Vol. III - pp. 691-692, Vol. I - pp. 32, 120-122).

She taught and coached in elementary, junior and senior high schools and continued to improve her coaching skills by attending clinics, studying texts and extensive reading (A. Vol. III - pp. 695-

697; Vol. I - pp. 121-122).

Mrs. Jacobs first became employed by the College of Willian and Mary on a part-time "temporary restricted appointment" during the school year 1974-75 as an administrative assistant for intramural sports. In 1975-76, she was similarly employed as the Director of Women's Intramurals, Women's Junior Varsity Basketball Coach, with teaching responsibilities for softball and basketball. In 1976-77, she was again similarly employed (except she drew a full salary during the Fall semester) as the Director of Women's Intramurals, Women's Varsity Basketball Coach, with teaching responsibilities for bowling. And in 1977-78, she was again similarly employed with the same duties as in the previous year (A. Vol. I - pp. 32, 45).

During the school year 1977-78, Mrs. Jacobs had three major duties: (1) direct the Women's Intramural program; (2) coach

the Women's Varsity Basketball Team; and (3) teach bowling (A. Vol. III - pp. 698-701).

Mrs. Jacobs was paid the sum of $6,090.00 for performing her duties in the 1977-78 term (A. Vol. I - p. 247; Vol. III - p. 734). Mr. Edward E. Jones, a male who directed the Men's Intramural program, coached baseball (a non-revenue producing sport) and taught physical education courses, was paid the sum of $17,320.00 (A. Vol. II - pp. 570-576). Mr. William Bruce Parkhill, a male and the Men's Varsity Basketball Coach, earned approximately $21,000 (A. Vol. II - p. 591). Mr. Parkhill had two assistant coaches, both males, one of whom earned approximately $12,000-$13,000, and the other earned "around" $9,000 (A. Vol. II - pp. 595-596).

William and Mary has a separate athletic program for men and women, and each program is chaired by a separate athletic

director who is responsible for same; in most of the other colleges in Virginia, both programs are headed by a single Director (A. Vol. III - pp. 647-648; Vol. IV - p. 1039).

Mr. Jones testified that the operating budget for the Men's and Women's Intramural Programs were each in the same amount ("roughly $15,000"), and he devoted about three hours a day to intramural duties (A. Vol. II - pp. 576, 582-583).

Mrs. Jacobs testified she devoted approximately thirty hours per week plus Sunday afternoons to her intramural duties, and taught classes and began preparations for coaching basketball in August and actual practice began November 1st (A. Vol. III - pp. 699-703); Vol. I - pp. 308-310).

Mrs. Jacobs detailed her coaching duties which included tryouts, scheduling and conducting practices, supervising the

maintenance of the gym, instructing the players as to game philosophy and skills, assessing and managing talent, scheduling opponents, publicity, arranging for officials, arranging for transportation, accommodating the visiting team, personal appearances, correspondence, participating in the awarding of athletic scholarships, scouting, filing reports and, in addition, devoting at least an hour after practice to counseling with her players on their personal, social and academic concerns. During basketball season, which extended to the middle of March, in addition to working at home, Mrs. Jacobs worked at the College from 1:00 p.m. to 11:00 p.m. or later, and being a member of the faculty, was required to attend faculty meetings (A. Vol. III - pp. 704-713).

In 1977-1978, Coach Jacobs' team won 15 games and lost 7, and she also had a winning season the preceding year (A. Vol.

III - p. 703).

Coach Parkhill testified as to his duties as the Men's Basketball Coach which included evaluation of talent, philosophy of play, meetings, devising a master plan for practice, recruiting trips, correspondence and counseling. He also stated it was a full-time position, and that during the season, he works between 9:00-9:30 a.m. and 6:00 p.m. and makes phone calls in the evening (A. Vol. II - pp. 592-593, 614-616).

Mr. Parkhill also testified that Men's Basketball was a revenue-producing sport and that puts pressure on the coach. He did not know whether the basketball team was operating at a loss, and stated that he had an extended three-year contract, although he had a losing season in the last two out of three seasons (A. Vol. II-pp. 601, 622-623).

Coach Parkhill also testified that his assistant coaches taught badminton and

basketball (six hours per week), in addition to helping him. He also stated that, although he and his assistants are on a twelve-month contract, there is a let up in the summer regarding administrative work, and it is "difficult to break it down into hours spent" (A. Vol. II - pp. 594-597).

In March, 1978, Mrs. Jacobs learned from Mrs. West that her position and others would be "fully funded" the following year and that she would have to apply for it like everyone else. The position announcement stated that a Master's Degree was required for four positions which were available in the Women's Physical Education Department. The available positions included (subject to combination) the Mermette Advisor, Basketball Coach, Track Coach, Trainer, Intramural Director and Sports Information Director. In addition to having playing, coaching or profession-

al experience in the foregoing areas, the announcement stated the applicant should have teaching competencies in such activities as archery, bowling, tennis and acquatics. The appointments were full-time and ran from August 15th to June 1st and provided for a salary of $10,000.00. Dr. Patricia B. Crowe was designated thereon as Chairman, Search Committee and all applications were to be sent to her. (A. Vol. III - pp. 716-720; Vol. I - pp. 129, 315).

Dr. Crowe was instructed to interview Tammy Holder, a basketball player, concerning Mrs. Jacobs' qualifications. During the interview, Eloise Jacobs testified that Dr. Crowe asked Miss Holder, "But wouldn't you rather have a younger coach?" [admitted by the District Court for impeachment or credibility purposes only]. Dr. Crowe denied asking Tammy about a younger coach, "someone like Mary Ann

Stanley." Miss Stanley is the Coach at Old Dominion University and is under 30 years of age. During the conversation, some negative comments about Mrs. Jacobs were elicited. Mrs. Jacobs, after talking with Tammy, asked Mrs. West if she, Mrs. Jacobs, could be personally interviewed for the position. Mrs. West stated that she could have an interview, but Mrs. Jacobs was not afforded an interview, or an opportunity to respond to the adverse criticism. No member of the Mermettes or Track Team was interviewed by the Committee (A. Vol. III - pp. 677, 717, 718, 723-724, 903-904, 954-956; Vol. IV - 1090-1092).

The Search Committee prepared a package of documents which were utilized by the Committee and the faculty in making the job selections (A. Vol. I - pp. 258-288) and included a chart which listed each applicant's name, age, education, coaching experience, playing experience

and strong teaching experience (A. Vol. I-pp. 276-285).

In addition to its Chairman, Dr. Crowe, the Search Committee was composed of Mildred B. West, Debra Hill, Joy Archer and Christina Jackson. The job descriptions for the Search Committee, prepared by Mrs. West, required the preparation of the above-mentioned chart, and required that a number of candidates be selected for interviews. Coach Jacobs was among the final four candidates considered for the Basketball position. Three candidates were interviewed: Barbara Wetters, age 24 (Basketball), Karen Kohn, age 35 (Basketball), not selected, and Annie Poffenbarger, age 25, who was selected for the combined Track and Intramural position (A. Vol. I - pp. 258-264; Vol. III - pp. 686-687, 953-956).

Miss Wetters did not have her Master's Degree at the time she was selected, although Mrs. West stated she was the top

candidate. Debra Hill, age 28, the Track and Volleyball Coach, testified that she came to The College in 1976, and that her position required a Master's Degree, but that she still had not obtained the Degree. Miss Hill also stated that she was a good personal friend and classmate of Miss Wetters and that while serving on the Search Committee called her and told her of the opening (A. Vol. III - pp. 658-659; Vol. IV - pp. 968, 977-978, 980-981; Vol. IV - pp. 496, 997-998).

The position announcement provided for a salary of $10,000.00 for each position. Miss Wetters' salary was fixed at $12,800.00; Marcia Milbrath, age 28, the former Mermette Coach who was re-hired, received $12, 340.00; Miss Poffenbarger, who had not completed her Master's Degree, received $10,000; and Miss Deborah Rawlings, age 27, who had her Master's Degree, was hired as the trainer and received $9,000.

Mrs. West testified that as long as someone was working on her Master's Degree, she could apply and the Search Committee would determine how the applicant was progressing toward her Degree (A. Vol. I - pp. 266-270; Vol. III - p. 660).

In listing Coach Jacobs qualifications on the chart, she was given no credit for playing experience and that block was left blank. Under the heading, "coaching experience, years," she was credited with two years of basketball and as Intramural Director (A. Vol. I - p. 281).

Mrs. West testified that Mrs. Jacobs was not given credit for basketball playing experience because, even though she played in high school, in college, beyond college, was voted all state, and best player in the State of Louisiana, she did not play intercollegiately; her college had no intercollegiate women's team at the time she attended (A. Vol. III - p. 692). However, Karen Kohn

was given credit for non-intercollegiate basketball (A. Vol. III - pp. 668-669, 942).

Also, archery and bowling were listed as activities courses on the announcement and Mrs. Jacobs was given no credit for her accomplishments in those areas (A. Vol. I - p. 270; Vol. III - p. 670, 762-763).

Dr. Crowe testified that Mrs. Jacobs was not given credit for her high school and elementary school basketball coaching experience because, except for the fundamentals, the game had completely changed, and her experience was not pertinent to the present day, and, therefore, it was intentionally eliminated from her chart. Karen Kohn was given credit for high school coaching because here was pertinent (A. Vol. III - pp. 942-944).

Joan Hult, an expert in women's basketball and called by the College, testified that women's basketball, until the late sixties or early seventies, developed along somewhat different lines in different

areas of the country, regarding the number of players, and type of dribbling, but any responsible scholastic coaching should improve the qualifications of the coach. She also recognized the accomplishments and abilities of Margaret Wade, age 67, the legendary coach who played in the thirties, began coaching in the forties and continued into the seventies, coaching all types of women's basketball (A. Vol. IV - pp. 1050, 1075-1079).

In May, 1978, Mrs. West advised Coach Jacobs that she would not be rehired, as the young lady (Barbara Wetters) who was hired as the Basketball Coach was more qualified and, because the team and the faculty felt the team would not progress as well under Coach Jacobs as they would under a younger coach. In June, 1978, Mrs. Jacobs testified she had a further conversation with Mrs. West and stated to her that she will never admit that it "had to do with

age": Mrs. West said, "Yes, I will admit that it was age" (A. Vol. III - pp. 724-726).

Dr. Crowe also testified that none of the fourteen members of the Women's Athletic Department faculty had been over the age of forty at the time they were hired (A. Vol. III - p. 937).

Upon her termination, Coach Jacobs requested, but did not receive, a letter of recommendation covering her four years of employment at the College (A. Vol. III - pp. 726-729).

The Faculty Handbook provides that all teaching faculty members who are not entitled to tenure are considered to be "Probationary" appointments which may be terminated by the College at the end of the contract period without cause, but with written due notice of termination (A. Vol. I - pp. 94-96).

Section IV, paragraph 3(c) provided that that written notice will be given "at least

twelve months before the expiration of a probationary appointment after two or more years at the College" (A. Vol. I - pp. 96-98). Mrs. Jacobs was not given twelve months' written notice in advance of her termination (A. Vol. III - p. 259).

6. Reasons for Granting the Writ

Argument

Question (a): May a jury verdict be set aside where the evidence and inferences conflict?

The Court of Appeals was bound to view the evidence and the reasonable inferences therefrom in the light most favorable to the petitioner, even though contrary inferences might reasonably be drawn; and "it is the jury which 'weighs the contradictory evidence and inferences' and draws the 'ultimate conclusion as to the facts'." Continental Co. v. Union Carbide, 370 U.S. 690, 696, 700-701, 82 S. Ct. 1404, 8 L.Ed. 2d 777 (1962).

In Gallick v. Baltimore & Ohio R. Co.,

372 U.S. 108, 83 S. Ct. 659, 9 L.Ed. 2d 618 (1963), the State Court set aside a jury verdict on the grounds of insufficient evidence. This Court reviewed the record and determined that the lower Court "improperly invaded the function and province of the jury" as there was sufficient evidence to support the verdict (at p. 113).

Following the District Court's decision in this case, this Court in Texas Dept. of Community Affairs v. Burdine, 67 L.Ed. 2d 207 (1981), restated the basic allocation of burdens and Order of Presentation of Proof in a Title VII discrimination case. (Although the instant case is not a Title VII matter, the Courts rely on decisions involving Title VII for guidance. Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980) at p. 1066.

In discussing the allocation of burdens, this Court, in Burdine at Footnote 8 at p. 216, states, in part:

> "...the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." (Emphasis supplied).

Discrimination is usually established by circumstantial evidence, as direct evidence is likely to be unavailable. Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979). However, in Footnote 12 at p. 1014, Loeb states in part:

> "...A complainant of requisite age who offered evidence that, when fired, his employer said, 'I am firing you solely because I want someone younger,' might not need anything more to make out a prima facie showing of discrimination...." (Emphasis supplied).

The underlying motivation of Mrs. West and Dr. Crowe was to secure a younger coach. There is sufficient direct and indirect (circumstantial) evidence to support the jury's verdict on this issue, and the District Court exceeded its function in setting it aside.

As to the issue of equal pay, Mrs.

Jacobs introduced substantial evidence as to the content of her position as regards skill, effort, responsibility and time. She also introduced substantial evidence which detailed the job content of her male counterparts, and the District Court erred in setting the verdict aside on this count.

Question (b): What is the employee's burden of proof in an age discrimination case?

There is a conflict in the decisions of certain Federal Courts of Appeals on this issue.

In Laugesen v. Anaconda Company, 510 F.2d 307 (6th Cir. 1975), the Court held at p. 317, that:

> "There could be more than one factor in the decision to discharge him and that he was nevertheless entitled to recover if one such factor was his age and if in fact it made a difference in determining whether he was to be retained or discharged."

In Loeb, supra, at p.1019, the Court held the employee must prove that:

> "his age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate against him because of age he would not have been discharged" (Citations omitted).

In Spagnuolo v. Whirlpool Corp. 641 F.2d 1109 (4th Cir. 1981), the Court, in affirming a jury verdict for the employee, stated at page 1112 that it was following the holding in Loeb, supra. Hence, the standard imposed upon the employee in the First and Fourth Circuits is greater than that imposed by the Sixth Circuit.

Question (c): Is "comparable worth" an issue in an equal pay action?

There was substantial evidence to support a finding that Petitioner's position was intrinsically as worthy as that of her male counterparts. The majority in County of Washington v. Gunther, 49 L.W. 4623 (June 8, 1981) distinguished this issue in their decision (at pp. 4624-4625, 4628-2629), whereas the dissent stated that in enacting the Equal Pay Act Congress re-

jected the theory of "comparable worth" (at pp. 4629-4631).

Query? Although not raised below, is the exaction of "comparable" work by a state agency without comparable pay a "taking" without due process? Cf Lemons v. City and County of Denver, 620 F2d. 228 (10th Cir. 1980) cert. den. 101 S. Ct. 244.

Question (d): May a college create a property interest in a job by providing for advance notice of termination?

In ruling on a Motion for Summary Judgment filed by the College and the individual defendants on this issue, Judge Clarke, by Opinion and Order dated July 29, 1980 (Appendix A), determined:

> "The threshold issue we are asked to decide by the defendants' motion is whether these alleged facts state a claim for relief under § 1983 for a deprivation of the plaintiff's constitutional rights. We conclude that they do."...
>
> ..."This is but a species of the more general rule that the 'Due Process Clause is implicated [where] an individual has reasonably relied on agency regula-

> tions promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency.' United States v. Caceres, 440 U.S. 741, 752-53 (1979)".

The assumptions of Judge Clarke were borne out by sufficient evidence adduced at trial.

> Question (e): Is a public official immune from damages under 42 U.S.C. § 1983 unless he acted in bad faith?

The Appeals Court affirmed the opinion of the District Court which concluded that, as no evidence had been introduced to show that Mrs. West did not act in good faith, or that she acted wilfully, she could not be liable in damages under 42 U.S.C. § 1983. However, in Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992, 43 L.Ed.2d 214 (1975), this Court held at p. 322 that a school board member was not immune from liability for damages under § 1983, if he knew or reasonably should have known that the action he took within his sphere of

official responsibility would violate the constitutional rights of the student affected or if he acted maliciously. (Emphasis added). By requiring proof of bad faith, the lower courts placed a greater burden on the petition than required by this Court.

Conclusion

We therefore request that the decidion of the Circuit Court be reversed and that this Court enter Final Judgment in favor of Mrs. Jacobs in accordance with the intent of the Jury; and further, that this matter be remanded to the District Court for an award of attorney's fees.

RESPECTFULLY SUBMITTED

ELOISE A. JACOBS

By
Of Counsel

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit upon Counsel for the Respondents, Marshall Coleman, Esquire, Attorney General of Virginia, and Pamela A. Sargent, Esquire, Assistant Attorney General of Virginia, Surpreme Court Building, 1101 E. Broad Street, Richmond, Virginia, 23219, Counsel for Appellees, this 17th day of September, 1981.

Robert M. White
Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

ELOISE A. JACOBS,)

Plaintiff,)

v.) CIVIL ACTION NO. 79-133-NN

COLLEGE OF WILLIAM AND MARY, an agency of the Commonwealth of Virginia,) and

THOMAS A. GRAVES, JR., President, College of William and Mary, and)

MILDRED B. WEST, Head, Department of Physical Education for Women, College of William and Mary,)

Defendants.)

OPINION AND ORDER

The plaintiff is a former women's basketball coach and instructor at the College of William and Mary. The circumstances of her severance from that employment form the basis for this action against the College, its president, and

the head of the College's Department of Physical Education for Women. Specifically, the plaintiff alleges in Count I of the Complaint that she was paid at a lower salary rate than male employees doing comparable work. Count II alleges that her contract was not renewed because of her age; and in Count III, she claims that the defendants violated her constitutional right to due process by failing to give her proper notice that her contract would not be renewed and by failing to continue her employment for the required period of time following delivery of this notice. These acts allegedly violate 42 U.S.C. §§ 1983 & 2000e et seq. and 29 U.S.C. §§ 201 et seq. & 626. Jurisdiction is founded on 28 U.S.C. §§ 1337 & 1343. The matter comes before the Court on the defendants' motion for summary judgment on Counts I and III of the Complaint.

In Count I of her Complaint, the plaintiff alleges that she was paid less than her counterparts in the men's athletic department, notwithstanding that she performed comparable work, in violation of 42 U.S.C. § 2000e-2(a)[1] and 29 U.S.C. § 206(d)(1).[2] The plaintiff, how-

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1 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

This provision is applicable to state

ever, admits that she failed to file a charge of sex discrimination with the Equal Employment Opportunity Commission within 180 days of the termination of her employment or at any other time, as

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universities, see Shawer v. Indiana Univ. of Pa., 602 F.2d 1161 (3d Cir. 1979), and such institutions are not immunized from liability under this section by the Eleventh Admendment. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[2] 29 U.S.C. § 206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any

required by 42 U.S.C. § 2000e-5(e).[3] The timely filing of a charge with this agency is a jurisdictional prerequisite to any suit under 42 U.S.C. §§ 2000e, et seq. in federal district court. See United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977); Love v. Pullman Co., 404 U.S. 522 (1972); Doski v. M. Goldseker Co., 539 F.2d 1326, 1329 (4th Cir. 1976). Accordingly, insofar as this claim rests on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., this Court is

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other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

[3] This section states, in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . .

without jurisdiction to grant the plaintiff any relief.

However, this does not dispose of the plaintiff's allegation of sex discrimination contained in Count I. The plaintiff also alleges that the defendants' actions violated Section 6(d)(1) of the Fair Labor Standards Act, 29 U.S.C. § 206(d)(1), which prohibits sex discrimination in the payment of employees. This prohibition is enforceable against an agency of the State.[4] See Usery v. Charleston Co. Sch. Dist., 558 F.2d 1169 (4th Cir. 1977). See also Arritt v. Grisell, 567 F.2d 1267, 1270 (4th Cir. 1977). An employee

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[4] It also appears clear that the State is not immune pursuant to the Eleventh Amendment from a suit by a private citizen-employee under this Act. In Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973), the Supreme Court ruled that private suits by state employees were barred by the Eleventh Amendment. Although Congress had included state employees within the coverage of the Act, the Court

aggrieved by the acts of an employer in violation of this section may bring a civil action pursuant to section 16(b) of the Act, 29 U.S.C. § 216(b), and such a claim clearly may be brought in conjunctionwith a claim under Title VII. See Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1977); Hodgin v. Jefferson, 447 F. Supp. 804 (D. Md. 1978). Nothing in the present record requires the dismissal of this claim. The defendants' request for summary judgment on Count I

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found no authorization in section 16(b) of the Act for suits against the states or public agencies by their employees. However, section 16(b) was amended in 1974 to overcome this omission. This section now specifically authorizes any employee to bring "[a]n action to recover liability . . . against any employer (including a public agency) in any federal or state court of competent jurisdiction. . . ." 29 U.S.C. § 216(b) (emphasis supplied). This specific authorization is sufficient to overcome the state's Eleventh Amendment immunity. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

is therefore GRANTED insofar as this Court rests on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and DENIED as to the plaintiff's claim under section 6(d)(1) of the Fair Labor Standards Act, 29 U.S.C. § 206(d)(1).

In Count III of her Complaint, the plaintiff alleges that under College regulations she was entitled to notice of the decision not to renew her contract at least twelve months before the expiration of her appointment. She alleges that the College and the other defendants failed to give her notice as required by these regulations and that she received notice of her non-retention only three months before her employment was terminated. This omission, she concludes, was inconsistent with her constitutional right to due process, and in violation of 42 U.S.C. § 1983.[5]

The threshold issue we are asked to

decide by the defendants' motion is whether these alleged facts state a claim for relief under § 1983 for a deprivation of the plaintiff's constitutional rights. We conclude that they do.

At the time her employment at the College was terminated in June 1978, the plaintiff was a nontenured, part-time instructor and coach in the College's Department of Physical Education for Women. She had been employed in that Department since 1974. At all times her employment

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[5]This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

was designated as a "temporary, restricted appointment" under the terms of a one-year contract which was renewed each year. Throughout the period of 1974 to 1978, the plaintiff was paid as a part-time employee, except for a short period between September and December 1976, when she was paid as a full-time employee. The plaintiff has acknowledged that she was not a tenured employee and was not eligible for tenure.

Under these circumstances it is clear that the plaintiff had no right to notice and a hearing arising from the Constitution itself. Standing alone, her tentative and restricted employee did not amount to a "property" interest in continued employment sufficient to trigger these constitutional protections. See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). However, the plaintiff does

not rely exclusively upon the nature of her employment to establish that she was entitled to establish that she was entitled to twelve months' notice of her non-retention. She finds this requirement in the College's Faculty Handbook, Section 3 of which states:

> Written notice that a probationary appointment is not to be renewed will be given to the faculty member in advance of his or her appointment, as follows:
>
> . . .
>
> (c) At least twelve months before the expiration of an appointment after two or more years at the College.

Although the defendants argue that this section, and the remainder of the Handbook, applies only to full-time faculty members, nothing in the portion of the Handbook provided to the Court compels this conclusion. Whether the plaintiff's job fell within the class of positions covered by the Handbook, especially

Section 3 thereof, is a factual matter which must be resolved at trial and not by means of summary judgment. For purposes of this motion, the Court must assume the truth of the plaintiff's allegations that the Handbook, including Section 3, was promulgated by the College for the benefit of the class of employees to which she belonged, and that this Handbook reflected official College policy.

Given these assumptions, and the uncontested fact that the plaintiff was employed at the College for more than two years, it follows that she was entitled to written notice of the non-renewal of her contract at least twelve months before the expiration of her appointment. Stated another way, she was entitled to continue her employment for twelve months after receiving notice of her non-retention. As a result of the defendants' failure to give her adequate notice, the plaintiff

lost not only income for a substantial period, but also an opportunity assured by the College's regulations to continue in active employment while she sought out other career opportunities. It may be possible to characterize these benefits as an expectancy amounting to a "property" interest in continued employment, albeit for a limited period, established by the College's own rules. Cf. Bishop v. Wood, 426 U.S. 341 (1976); Perry v. Sindermann, supra; Sigmon v. Poe, 564 F.2d 1093 (4th Cir. 1977). Regardless of how the plaintiff's interest is characterized, however, it is not clear that the plaintiff has not been prejudiced by the defendants' alleged failure to follow the College's own rules. Having established procedures to be used when an untenured employee is not reappointed, the College was bound to follow these procedures. See Mabey v. Reagan, 537 F.2d 1036, 1042 (9th Cir.

1976), citing, Yellin v. United States, 374 U.S. 109, 121 (1963); Vitarelli v. Seaton, 359 U.S. 535, 545 (1959); Service v. Dulles, 354 U.S. 363 (1957). This is but a species of the more general rule that the "Due Process Clause is implicated [where] an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." United States v. Caceres, 440 U.S. 741, 752-53 (1979). The plaintiff alleges that the College failed to follow its own rules laid down for her benefit, upon which she reasonably relied to her prejudice. In accordance with the foregoing principles, these allegations constitute a sufficient claim for relief under § 1983.

In support of their motion for summary judgment, the defendants also urge that the College, and the other named

defendants, insofar as they are sued in their official capacities,[6] are immune from suit under § 1983. This position is well-founded. The Eleventh Amendment[7] bars any suit by private parties seeking to impose a liability which must be paid from public property or funds unless the State has consented to the filing of such a suit. Quern v. Jordan, 440 U.S. 332 (1979); Alabama v. Pugh, 438 U.S. 781

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[6] The Complaint does not clearly state whether President Graves and Mildred West are named as defendants in their official capacities or in their personal capacities. However, the Complaint names these defendants with reference to their official titles, and broadly alleges that they personally participated in the acts or omissions of which the plaintiff complains. The Supreme Court's decision in Scheur v. Rhodes, teaches that allegations against state officials should be liberally construed in favor of the plaintiff. See Ahmad v. Burke, 436 F. Supp. 1307, 1311-12 (E.D. Pa. 1977). Viewed in this light, it appears that the plaintiff seeks judgments against these individuals both personally and in their official capacities. See id.

(1978); Edelman v. Jordan, 415 U.S. 651 (1974). Although this immunity may in some instances be overcome by legislation enacted by Congress under the Fourteenth Amendment, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1976 (Title VII), legislation has this effect only if Congress explicitly so intended. Quern v. Jordan, supra. The Supreme Court has determined that § 1983 was not intended to abrogate the states' Eleventh Amendment immunity, and that no liability may be imposed upon

[7] The Eleventh Amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Although the Amendment by its terms does not bar suits against a state by its own citizens, the Supreme Court has consistently interpreted it to have that effect. See Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Dawkins v. Craig, 483 F.2d 1191, 1193 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974).

an unconsenting state in an action brought under that section. Quern v. Jordan, supra; Edelman v. Jordan, supra. The immunity conferred by this Amendment extends not only to suits brought against the State itself, but also to those brought against its officers, agents and representatives where the state, though not named, is the real party in interest and will be affected by any judgment. See Alabama v. Pugh, supra; Edelman v. Jordan, supra, 415 U.S. at 663; Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); In re State of New York, 256 U.S. 490 (1921); Dawkins v. Craig, 483 F.2d 1191, 1194 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974); O'Neill v. Early, 208 F.2d 286 (4th Cir. 1953).

A threshold question which must be determined is whether the College constitutes an "arm of the State partaking

of the State's Eleventh Amendment immunity . . . ." Mt. Healthy City Bd. of Ed. v. Doyle, 429 U. S. 274, 280 (1977). The answer to this inquiry lies, in part, in examining the nature of the entity created by State law, id., and in determining whether the entity thus created has power sufficiently distinct and independent from the State as not to be considered merely a part of the State or merely its "alter ego." See Ahmad v. Burke, 436 F. Supp. 1307, 1310 (E.D. Pa. 1977). Although a number of state college and universities have been held to enjoy the protection afforded by the Eleventh Amendment, see, e.g., Perez v. Rodriguez Bou 575 F.2d 21 (1st Cir. 1978) (University of Puerto Rico); Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971); Williams v. Eaton, 443 F.2d 422, 427-28 (10th Cir. 1971) (University of Wyoming); Walstad

v. University of Minnesota Hosps., 442 F.2d 634, 641-42 (8th Cir. 1971); Board of Trustees of Arkansas A & M College v. Davis, 396 F.2d 730 (8th Cir.), cert. denied, 393 U.S. 962 (1968); Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F.2d 599 (10th Cir. 1966); Scott v. Board of Supervisors of Louisiana State University, 336 F.2d 557 (5th Cir. 1964); Board of Regents of the University of Nebraska v. Dawes, 370 F. Supp. 1190 (D. Neb. 1974),[8] the status of each state university must be considered on the basis of its own peculiar circumstances. Soni v. Board of Trustees, 513 F.2d 347, 352 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976).

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[8]But see Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir. 1979), holding that the Junior College was not an "arm of the state" in view of Texas law.

In arriving at an answer to this question, courts have considered a number of factors: whether and to what extent any judgment will be payable from the state treasury; the extent of funding provided to the institution by the state; the extent of the state's control in appointing the governing body of the institution; the degree of the institution's autonomy over its operations; whether the institution is separately incorporated; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation; and whether the institution's function is governmental or proprietary. See Perez v. Rodriguez Bou, supra, and other cases cited above. See also Robinson v. Dale, 464 F. Supp. 680, 686-87 (M.D. N.C. 1979) (reciting factors to be considered in determining whether a state university constituted the state's "alter ego" for purposes of diversity of

citizenship under 28 U.S.C. §1332 and under the Eleventh Amendment); Moreno v. University of Maryland, 420 F. Supp. 541, 549 (D. Md. 1976), aff'd sub nom, Moreno v. Elkins, 556 F.2d 573 (4th Cir. 1977), vacated on other grounds, Toll v. Moreno, 441 U.S. 458 (1979).

The College of William and Mary, from its inception, has been a public and not a private foundation. See Bracken v. William and Mary College, 5 Va. (1 Call) 161 (1797). Although its charter originated with the blessing of the English monarchs from whom it takes its name, the Board Of Visitors of the College has since been incorporated as a Virginia corporation by statute. Va. Code § 23-39. The College serves a governmental purpose: the education of the State's citizens and others. All real and personal property relating to the College is, by statute, the property

of the Commonwealth of Virginia. Va. Code § 23-40. Accordingly, any judgment against the College must be satisfied out of State property. The members of the Board of Visitors, the governing body, are appointed by the Governor, who is permitted broad discretion in naming such members. See Va. Code §§ 23-41 & 23-42. Funding for the College is supplied by the State, though the Board of Visitors is empowered to direct its application. See, e.g., Va. Code § 23-9.9 and § ¶3-49.1(c). The Board of Visitors is required to file an annual report with the office of the Superintendent of Public Instruction and State Council of Higher Education. Va. Code § 23-1. These factors lead the Court to conclude that the College constitutes an "arm of the state," partaking of the State's Eleventh Amendment immunity, and that the State is the "real party in

interest" insofar as the College may be held liable.

Having determined this, the next question is whether the State has waived this immunity, permitting suits against the College under § 1983. We conclude that it has not. Although section 8.01-192 of the Code of Virginia[9] (formerly section 8-752) permits certain claims to be brought against the Commonwealth, this statute specifically provides that such claims must be brought in "an appropriate circuit court for re-

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[9]Va. Code § 8.01-192 provides:

> When the Comptroller or other authorized person shall disallow, either in whole or in part, any such claim against the Commonwealth as is provided for by §§ 2.1-223.1, 2.1-223-3 or 8.01-605 at which time a right of action under this section shall be deemed to accrue, the person presenting such claim may petition an appropriate circuit court for redress.

Sections 2.1-223.1, 2.1-223.3 and 8.01-605, cited therein, provide:

dress." A state's waiver of immunity in its own courts, however, does not necessarily operate as a consent to be sued in federal court as well. See Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573 (1946); Medicenters of America, Inc. v. Virginia, 373 F. Supp. 305, 307 (E.D. Va. 1974). A waiver of the State's Eleventh Amendment immunity effective as to actions brought in federal court must result from a clear legislative intent to accomplish that end. No such clear

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[9] (Continued)

> § 2.1-223.1. To whom claims to be presented. -- Any person having any pecuniary claim against the Commonwealth upon any legal ground shall present the same to the head of the department, division, institution or agency of the Commonwealth responsible for the alleged act or omission which, if proved, gives rise to such claim; provided, however, that whenever the claimant cannot identify such alleged act or omission with any single department, division, institution or agency of the Commonwealth, then the claim shall be presented to the Comptroller.

[9]Continued

§ 2.1-223.3. Claims to be examined and forwarded to Comptroller; what Comptroller may allow. -- Every claim authorized to be presented to the Comptroller or to the head of a department, division, institution or agency shall be examined by the person to whom it is presented and forwarded with appropriate supporting papers and recommendations without unreasonable delay to the Comptroller, who shall promptly allow so much on account thereof as may appear to be due.

§ 8.01-605. How person entitled to money paid into State treasury may recover it. -- Money paid into the State treasury under the provisions of this article shall be paid to any person entitled thereto, who has not asserted a claim to the same in the suit or proceeding in which it was held as aforesaid, upon satisfactory proof that he is so entitled. Such claim shall be presented to the Comptroller and may be allowed by him upon satisfactory proof. If such claim be disallowed, the claimant may proceed for its recovery in an appropriate circuit court in the manner provided in §§ 8.01-192 through 8.01-195. If, in such proceeding, the claim be established, the net amount thereof, after deducting costs and other proper charges, shall be paid to the claimant out of the treasury on the warrant of the Comptroller. No limitations shall bar any claim presented or asserted under this section.

intent underlies § 8.01-192, nor can this Court find any other indication that the Commonwealth of Virginia, or the College, has consented to be sued in federal court. See Edelman v. Jordan, supra, 415 U.S. at 673-74; Medicenters of America, Inc. v. Virginia, supra.

We conclude that the College, as an agency of the State, is immune from any liability arising from the facts alleged in Count III, whether in the form of damages, or any retroactive injunctive relief such as reinstatement. Alabama v. Pugh, supra; Edelman v. Jordan, supra. Nor can the Court conceive of any appropriate injuctive relief which would have merely an "ancillary" effect upon the State or College, which could be awarded against this defendant in this case.[10] See Hutto v. Finney, supra, 437 U.S. at 690; Edelman v. Jordan, supra, 415 U.S. at 668. Accordingly, the College is

DISMISSED as a defendant to Count III of the Complaint. For the same reasons the individual defendants are immune from liability under this Count insofar as they have been sued in their official capacities, Edelman, supra; Ford Motor Co. v. Department of Treasury, 323 U.S. at 462-64, although they may be liable personally for their alleged misconduct and therefore should remain as defendants. Scheur v. Rhodes, 416 U.S. 232 (1974); Jervey v. Martin, 336 F. Supp. 1350, 1354 (W.D. Va. 1972).

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[10]Again, the Complaint is unclear as to the precise relief requested. In her demand for judgment in Count III, the plaintiff requests "back wages, liquidated damages, court costs, attorney's fees, and such other and further relief as to the Court may seem proper . . ." Although no specific request for reinstatement or other injuctive relief is included, it may be that the plaintiff's request for "further relief" is sufficiently broad to include such relief if warranted.

Having determined that the College is immune from any relief which might appropriately be granted in this action, we need not reach the more troublesome question whether the College, as a State agency, is a "person" within the meaning of § 1983, a question which has been clouded by a number of recent decisions by the Supreme Court. See Quern v. Jordan, supra (especially the concurring opinion of Justice Brennan); Lake Country Estates v. Tahoe Planning Agcy., 440 U.S. 391, 398-400 (1979); Alabama v. Pugh, supra; Hutto v. Finney, supra, 437 U.S. at 700-710 (concurring opinion of Brennan, J., and concurring and dissenting opinion of Powell, J.); Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Edelman v. Jordan, supra. However, it appears to this Court that the Supreme

Court's decision in Quern v. Jordan, supra, effectively forecloses application of § 1983 to states and their agencies.

For the foregoing reasons, the defendants' motion for summary judgment is GRANTED as to that part of Count I which rests upon Title VII, 42 U.S.C. § 2000e et seq., and as to Count III insofar as it alleges any claim against the College or the other named defendants in their official capacities. However, the College remains a defendant to Counts I and II, and the individual defendants remain defendants to Counts I and II in all capacities, and to Count III in their personal capacities.

/s/ J. Calvitt Clarke,
United States District Judge

July 29, 1980

Norfolk, Virginia

APPENDIX B

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

Eloise A. Jacobs, Plaintiff,	]	
v.	]	CIVIL ACTION NO. 71-133-NN
COLLEGE OF WILLIAM AND MARY, et al,	]	
Defendants.	]	

OPINION AND ORDER

Eloise A. Jacobs seeks to recover of defendants damages for alleged (a) discrimination against her in pay because of her sex,[1/] (b) discrimination against her because of her age,[2/] and (c) violation of her constitutional rights by failing to give her proper notice that her contract

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1/ Alleged to be in violation of 42 U.S.C. §2000e-2(a) and 29 U.S.C. § 206(d)(1). The action under 42 U.S.C. § 2000e-2(a) was dismissed for failure to follow the administrative procedure and file the notice required by 42 U.S.C. § 2000e-5(e).

2/ Alleged to be in violation of 29 U.S.C. § 623.

would not be renewed.[3] Upon motion, the Court dismissed the action based on any allegation of a violation of 42 U.S.C. § 2000e-2(a) for failure to follow the provisions relating to notice,[4] and Count III as to any claim against the College or other named defendants in their official capacities.[5] Hence, the action remained or continued as to Counts I and II against the College and the individual defendants in all capacities, and as to Count III against the individual defendants in their individual capacities.

Certain facts were stipulated by the parties, namely, that plaintiff was born April 1, 1938; College is operated by the Commonwealth of Virginia and is an agency thereof; Thomas A. Graves, Jr. is president and Mildred C. West is chairperson

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3/ Alleged to be in violation of 42 U.S.C. § 1983.

4/ and 5/ See Opinion and Order of July 29, 1980, filed July 31, 1980.

of the Women's department of Physical Education, respectively, of College, and each of them held such positions at all times relevant to this action; that plaintiff was employed by College for the school years 1974-75, 1975-76, 1976-77 and 1977-78, as a part-time employee on the basis of "temporary restricted appointment," except for the Fall Semester 1976, during which she was employed on the basis of a full salary, temporary restricted employment. Further, the parties stipulated that the general duties performed by plaintiff during her years of employment were:

1974-1975: Administrative Assistant for Intramural Sports.

1975-1976: Director of Women's Intramurals, Women's Junior Varsity Basketball Coach, teaching responsibilities for softball and basketball.

1976-1977: Director of Women's Intramurals, Women's Varsity Basketball Coach, teaching

responsibilities for bowling.

1977-1978: Director of Women's Intramurals, Women's Varsity Basketball Coach, teaching responsibilities for bowling.

In March 1978 College announced the creation of four full-time positions in the Women's Department of Physical Education. Plaintiff applied for one of these positions but was not selected. Tried to the jury, it returned a verdict in the following language -

> We, the Jury, find -
>
> As to Count I for Plaintiff $51,200.00 in the claim against College of William and Mary, on the equal pay claim and corresponding to the same equal pay as Mrs. Wetters. ($12,800.00 pr. yr.) - 4 years
>
> As to Count II for Plaintiff in the Claim against College of William and Mary on the age discrimination claim and $10,000.00
>
> As to Count III for Plaintiff against Mrs. West on the claim against Dr. Graves and Mrs. West on the claim of having violated the plaintiff's rights, and $10,000.00

Defendants have moved for judgment in their favor, or in the alternative to grant them a new trial.

I

A jury verdict is to be viewed in the light most favorable to the party in whose favor it is found, and such party is entitled to the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be drawn. Jackson v. Virginia, _____U.S._____, 99 S.Ct. 2781, 2793 (1979); Continental Co. v. Union Carbide, 370 U.W. 690, 696, 82 S.Ct. 1404, 1409 (1962); Lavender v. Kurn, 327 U.S. 645, 652; Howard v. McCrory Corp., 601 F.2d 133, 136 (4th Cir. 1979); Krodel v. Houghtaling, 468 F.2d 887, 888 (4th Cir. 1972).

Issues of fact should be left to the determination of the jury, whose duty it is to determine the credibility of the witnesses, and the Court should not

attempt to substitute its judgment for that of the jury in disputed cases. But, a jury must not be left to speculation or conjecture, or render a verdict based on sympathy. Where a verdict is contrary to the law or the evidence, or without evidence to support it, it is the duty of the Court to set the verdict aside. Any other rule would make the verdict final and not subject to question or review. The test to be applied is that when "the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict," the Court should set the verdict aside. Brady v. Southern Railway Company, 320 U.S. 476, 479-80, 64 S.Ct. 232, 234 (1943), and cases cited therein. See also Howard v. McCrory Corp., supra. Where "there is no substantial evidence to support the verdict," even though resolution of inferences must be left to the jury,

nevertheless, "it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." Business Development Corporation of North Carolina v. United States, 428 F.2d 451, 453 (4th Cir. 1970). See also Hawkins v. Sims, 137 F.2d 66, 67 (4th Cir. 1943); Ford Motor Co. v. McDavid, 259 F.2d 261, 266 (4th Cir.), cert. denied 358 U.S. 908, 79 S.Ct. 234 (1958); Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, 386 F.2d 193 (4th Cir. 1967). The Fourth Circuit spoke in United States v. Shipp, 409 F.2d 33 (4th Cir. 1969), a criminal case, but said the same test applied in civil cases, thusly -

> These general principles demonstrate that it is not ordinarily within the appellate court's province to review a jury's resolution of issues of credibility. The trial judge, who like the jury had the advantage of observing the witnesses as they testified, is vested with broader power. Even when there has

> been substantial evidence which required him to submit the case to the jury, he may in his discretion set the verdict aside and grant a new trial if he thinks the verdict is against the weight of the evidence, and it is his duty to do so if he is convinced that permitting the verdict to stand would result in a miscarriage of justice. The power exists in both civil and criminal cases.

In Wachovia Bank and Trust Company v. United States, 288 F.2d 750 (4th Cir. 1961), in approving the entry of a directed verdict, the Court quoted from the opinion of Judge Soper in United States v. Grannis, 172 F.2d 507 (4th Cir. 1949), setting aside the judgment based on a jury verdict, where at page 513, he said:

> In the federal courts the judge should direct a verdict for either party, even if the party has the burden of proof, when the facts are so convincing that reasonable men could not differ as to their significance; and this is especially true when there is no conflict in the evidence (Citations omitted). "* * * When, on the trial of the issues of fact in an action at law before a Federal Court and a jury, the evidence, with all the

> inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party."

In Ford Motor Company v. McDavid, 259 F.2d 261 (4th Cir. 1958), cert. denied, 358 U.S. 908, the Court set aside a judgment for plaintiff, based on the verdict of a jury, and directed entry of judgment for defendant, saying at page 266, that the old rule of not permitting a jury to draw any inference from circumstantial evidence, if one is as probable as the other, has been replaced by the more sensible rule -

> that it is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the Court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.

See also Norfolk Southern Ry. Co. v. Davis Frozen Foods, 195 F.2d 662 (4th Cir. 1952); Wright v. Grain Dealers Nat. Mut. Fire Ins. Co., 186 F.2d 956 (4th Cir. 1950); Hartman v. Baltimore & Ohio R. Co., 89 F.2d 425 (4th Cir. 1937).

Not only do defendants say the verdict is contrary to the law and the evidence, but that it is so excessive as to warrant a finding the jury was misled by a mistaken view of the evidence.

II

Having set out the principles controlling the Court in a ruling on a motion for judgment, n.o.v., we proceed to consider each claim upon which plaintiff obtained a verdict.

A.

In Count I plaintiff asserted a claim under the equal pay act, 29 U.S.C. § 206 (d)(1), which prohibits discrimination in rates of pay between employees on the

basis of sex. That is, there must be equal pay for equal performance which requires equal skill, effort and responsibility.

First, defendants say that any award of damages under Count I must be limited to damages incurred during the two years immediately preceding the filing of the complaint on November 12, 1979; that since plaintiff, during said two years, was employed by the College from December 12, 1977 until June of 1978, an award of four years service is excessive and improper. 29 U.S.C. § 255, EEOC v. Gilbarco, Inc., 615 F.2d 985 (4th Cir. 1980); Hodgin v. Jefferson, 447 F.Supp. 804, 809 (D.C. Md. 1978).

Here the verdict of the jury as to Count I, the equal pay claim, sets forth it is for a four year period. It says it is for pay "corresponding to the same equal pay as Mrs. Wetters ($12,800.00

pr. yr.) - 4 years."[6/] It is clear the equal pay claim was not to be measured by the sum paid a female employee whose employment was after that of plaintiff. Her equal pay claim is to be measured by that of the opposite sex. It is clear this part of the verdict cannot stand.

But defendants say that the evidence would not sustain any verdict for plaintiff on this claim.

To make out a case under the Act, the plaintiff must show "that an employer pays different wages to employees of different sexes 'for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions.'..." and plaintiff "has the burden of proof on this issue." Corning Glass Works v. Brennan, 417 U.S. 188, 195, 194

6/ Mrs. Wetters was the new coach employed at a pay of $12,800.00 per year.

S.Ct. 2223, 2228 (1974). See also Hodgson v. Fairmount Supply Company, 454 F.2d 490, 493 (4th Cir. 1972). Once plaintiff carries her burden of showing an employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to defendant to show that the differential is justified under the Act.

While plaintiff asserts she was not given equal pay for equal work on jobs the performance of which require equal skill, effort and responsibility (work), she does not name a specific person of the opposite sex by which to measure pay. Plaintiff's duties were stipulated to in the final pretrial order. While evidence of periods prior to the period for which plaintiff may maintain this action and recover was permitted, plaintiff must show a difference in pay for equal work for the period December 1977-78. Counsel

all agree this is the period in issue. For the school year 1977-78, she was "Director of Women's Intramurals, Women's Varsity Basketball Coach, teaching responsibility for bowling." She said this was equal to the work of the Men's Basketball Coach and of his two assistants, and the Baseball Coach.

Plaintiff holds a major Degree in Business Education of Commerce, a minor in Health, Physical Education and Recreation, a Master's Degree in Guidance and Counseling. She played basketball in high school and played on a women's basketball team at L.S.U., but she did not play intercollegiate basketball because there was no such sport at her college. She coached basketball in high school for two years after leaving college. She taught in high school. Later she taught Health, Physical Education and Recreation in high school, directed cheerleaders and later

coached a girls' basketball team. After coming to Virginia in 1967, she taught in an elementary school, and there coached a boys basketball team, and a girls' basketball team. She read books and attended clinics. She came to William and Mary in 1974. In 1977-78 she was director of Women's intramural program, along with coaching, and she said that on her own she did scouting and recruiting. She devoted 3 days a week to her work. She taught one or two classes a semester. The class would run one to two hours and be held twice a week. She coached volleyball, basketball, and some other sports, but not at the same time. That is, she would start basketball after volleyball ended and so on, although there could be a two-week overlap.

Corning Glass Works v. Brennan, supra,

makes it clear that the Act incorporates "well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." 94 S.Ct. p. 2231.

Edward E. Jones coached baseball during the period in question. He was Associate Professor of Physical Education at the College, and had been there for 19 years, that is, since 1961. He taught full time, on the average of 12 to 13 hours a semester, which would be in-class time of 15 to 17 hours a week. In addition, he was intramural director and had been since 1965, which was responsibility for the men's intramurals program. His program consisted of some 20 activities, in which 60% of the students

participated. That is, between 12 and 13 hundred men participated in one or more activities each year. The Department had two assistants that were in Physical Education, and who assisted Jones, but this was not their primary responsibility. They taught in the College and were paid for their teaching responsibilities, but not for their sports activities. In addition, Jones teaches the activity courses. Most of the students are required to have four units in physical education, and Jones teaches these courses. In the 1977-78 year he taught handball and an orienteering course. Jones' salary for the school year 1977 to 1978 was $17,320.00 He said in coaching he spent about three hours a day on

the field. In addition, he had the responsibility for the Gym, which was the center for recreation, and he was in charge of maintenance of the intramural fields, and keeping them in playing condition. The manual labor is done by the plant department, but Jones had graduate assistants who helped him.

Jones has a Bachelor of Science with a major in Physical Education. He holds a Master of Education, with emphasis in Education Administration.

His contract as a professor did not require Jones to work as intramural director, and he received no additional funds for this work, nor for maintenance of the intramural fields.

William Bruce Parkhill is the head coach of men's basketball at the College, and a twelve month employee. He came there in 1972 as assistant basketball coach, and became head coach in the 1977-78 season at a salary of approximately $17,000.00. A major part of his duties as coach is that of recruiting, which extends over the spring, summer and fall months, as well as during the basketball season. It requires extensive travel to schools and homes of prospective students to observe their play, to confer with them, and seek to have them agree to attend the College. These trips often extend for one to two weeks at a time, during which the coach is away from his home and on the road. Because the College maintains a high academic standard, the coach and his assistants must counsel the players academically so they can remain in school. The coach

must establish weekly meetings with them, establish a master plan for the practice season, including a daily practice schedule.

The men's team plays in Division I of the NCAA. In this Division the College may use financial aid by giving a total grant-in-aid -- room, board, books, tuition, and fees for student athletes. In Division II, the College may give some financial help, such as scholarship help not based on need. In Division III aid is based solely on need. The men's basketball team is a revenue producing sport. This creates pressure on the coach to produce, in order to sell season tickets, obtain contributions for scholarship funds, and establish a winning season. The playing schedule is about 26 games a year.

Parkhill has two assistant coaches, who have teaching responsibilities of about six hours a week. One is paid

$12,000.00 to $13,000.00, the other about $9,000.00. The assistants work twelve months, and average more than eight hours a day.

Parkhill has a BS Degree in Health and Physical Education, and a Master's in Physical Education.

Plaintiff was employed for nine months only. She was Director of Women's Intramurals. She said "my primary duty...was to direct the women's intramural program, ... So, I did this, along with coaching basketball, which involved quite a few hours in scouting and recruiting, which I did on my own." Tr. of Ev. p. 167. She said her duties required ten hours a day three days a week. The position did not include recruiting. The women's basketball team was playing in small colleges league and governed by the provisions of the AIAW Handbook. Under the regulations, the College was prohibited

from subsidization or reimbursement of expenses for bringing prospective student athletes to the campus, and the College may not require personnel to undertake recruiting or scouting at their own expense. Plaintiff said the College was not allowed to suggest a faculty member do recruiting, and the College never suggested she do recruiting, or that it was a part of her job, and what recruiting and scouting she did, she did as a volunteer. Tr. of Ev. pp. 233-4. She could and did some recruiting by letter, and some scouting on her own. Any attempt to compare equal performance which requires equal skill, effort and responsibility between plaintiff and baseball coach Jones fails. He teaches full time, while plaintiff does not. This is enough to establish a difference, although there are many others. As to comparison with Parkhill, the men's basketball coach, the differences in skill,

effort and responsibility are numerous, as are the duties. A substantial part of Parkhill's position is work, effort and skill in recruitment, requiring extended travel and absence from his home, along with writing and telephoning, while plaintiff's required duties were telephoning, writing or responding to letters; Parkhill's employment extends to full employment twelve months a year, while plaintiff's duties are for nine months and generally limited to three days a week; Parkhill's coaching is in Division I, and plaintiff's is a wholly different type. As to the assistant coaches, they have teaching responsibilities of six hours a week and are annual employees. Further, and of importance, is the fact men's basketball is a revenue producing sport and women's basketball is not. The levels of coaches "are quite broad...requiring widely varying skills and background,"

and the evidence does not "show that within these levels [classes] the actual positions held by each during the periods of comparison required skill, effort and responsibility substantially equal to that required to perform the actual positions held by the males whose salaries were compared." Stastny v. Southern Bell Telephone and Telegraph Company, _____F.2d _____, ¶ IV-B (4th Cir. 1980). To "establish a case [of discrimination]... it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation," and while the "jobs in question need not be identical,...they must be substantially equal." Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166,171 (5th Cir. 1975). In the Orr case, the Court quoted from its opinion in Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973), the following:

> "When Congress enacted the Equal Pay Act, it substituted the word 'equal' for 'comparable' to show that 'the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.' "

See also Ammons v. ZIA Company, 448 F.2d 117, 120 (10th Cir. 1971). The Orr case, supra, and Ammons case, supra, were cited with approval in Stastny v. Southern Bell, supra. Here, plaintiff must first prove discrimination because of sex, as "Congress did not intend that a naked averment of job discrimination would suffice to establish a prima facie case under the Equal Pay Act," but it requires "factual support of an accusation that the employer paid the aggrieved employee wages at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar conditions."

Ammons v. ZIA Company, supra.

There is a complete absence of any evidence of sex discrimination. It is "clearly apparent from the undisputed evidence ...that" Parkhill and his assistants, and Jones "had greater responsibilities and were required to exercise greater skill in the performance of their jobs than was [plaintiff]," and "the evidence fails to show sex discrimination." Orr v. Frank R. MacNeill & Son, Inc., supra [511 F.2d 171]. There is here "no showing of any salary differential for...positions which were substantially equal...." Keys v. Lenoir Rhyne College, 552 F.2d 579, 580, (4th Cir. 1977). The evidence being undisputed, there is but one verdict which can be rendered.

B.

Plaintiff's second claim is that she was denied employment in the newly created position as full-time female varsity basketball coach solely because of her age,

in violation of 29 U.S.C. § 623, the Age Discrimination in Employment Act. Pursuant to 29 U.S.C. § 627, the prohibition of the Act is limited to persons who are at least 40 years of age. Plaintiff was born April 1, 1938, and attained the age of 40 on March 31, 1978.

Sometime about March 1978, announcement was made of four full-time appointments in the Physical Education Department, which combined responsibilities in women's athletics and physical education for the 1978-79 academic year. The positions combined one or more of the women's athletics with teaching responsibilities. The appointments were to become effective August 15th and extend to June 1st. Among the women's athletics were basketball coach, track coach, intramural director, and so on. The qualifications required were listed as (a) Master's Degree, (b) experience and competency in areas of

application.

A Search committee was named composed of Dr. Patricia B. Crowe, as chaiman, with four other faculty members, including Mildred B. West, who was Chairman of the Department of Physical Education. The procedure to be followed by the search committee was set forth in writing. See Defendants' Exhibits 14 and 16. Notices with job descriptions were sent to a total of 85 colleges and universities. A folder was created for all qualified applicants. Some 88 persons applied. A review of the applications was done by the search committee. The committee selected some 24 possible candidates. This list was subsequently reduced to 14. The ultimate selection was to be made by the entire faculty of the Department. At the faculty meeting the list was further reduced to 8 and then to 5.[7/] The faculty was furnished

7/ If age was a factor, why was plaintiff even included in the reduced number?

with the information on the 24 and requested to especially look at the files with information on each applicant. Schedules were set up for interviews for basketball, track and intramural and training positions.

A chart was prepared setting forth the education, coaching experience, playing experience, strong teaching experience, etc., of those on the list, which was presented to the faculty for its consideration. The same procedures were used in selecting the persons to fill each of the four positions. The faculty unanimously voted to employ Barbara Wetters as basketball coach and instructor for the 1978-79 year. The search committee had recommended her. It said in its recommendation that from interviews, background, experience, qualifications and performance, as between the plaintiff and Wetters, Wetters was better qualified

to coach basketball and to teach in the specific areas designated in the announcement of the position than any other person interviewed, including the plaintiff.

The qualifications of plaintiff and Wetters were compared by the committee and faculty. The faculty unanimously chose Wetters. Numerous witnesses compared their qualifications and the only witness that did not say Wetters was better qualified than plaintiff, was the plaintiff.

Plaintiff complained that the position was advertised at $10,000.00, but that Wetters was given a contract at $12,800.00 because she was then coaching at a college and then receiving that sum. If the College was to obtain her services they had to meet the salary request.

Before selecting the person to fill the position some members of the faculty suggested the captain of the basketball team should be interviewed. The chairman

of the selection committee interviewed the captain and reported to the faculty. The nature of the interview is set out in Defendants' Exhibit 15. The captain related that a majority of the team members generally were not happy regarding their skill, learning and performance; that the present coach (plaintiff) did not have the knowledge that the team expected or demanded; that the players' skill potential was not being tapped or explored; that the team's expectations were not being fulfilled in terms of the team's collective and individual skill and potential; that the team was extremely fond of plaintiff as a person, but the team felt the knowledge and skill of the coach was not indicative of a qualified candidate for the full-time position. This information was considered by the faculty in making the selection.

Plaintiff says that the requirements

for the position were listed as a Master's Degree in Physical Education, and that Wetters did not have such a Master's Degree. The evidence establishes that at time of her application all of her course work had been done toward the Master's Degree; that she had completed her thesis in the summer before she started work and that her "orals" had to be scheduled in the fall because of lack of availability of faculty at the institution from which she was receiving her degree. Further, the evidence is clear that where one has done the course work, but not finished the thesis or done the "orals," they are considered as proper to fill a position requiring a Master's Degree, if they ultimately complete the thesis and the orals.

More important, plaintiff does not have a Master's Degree in Physical Education. Hence, this advertised requirement could not be met by plaintiff.

There is no evidence that age was ever mentioned by any member of the selection committee or faculty during the process of grading or discussing the qualifications of applicants for the position of a basketball coach, or that the issue of age played any part in the selection.[8/] Plaintiff's first witness, Carolyn Edwards, a reporter for the newspaper, testified plaintiff told her she would no longer be coaching at the College; that as a result of this information she contacted Mildred West, who confirmed the fact; that she asked Mildred West whether age had been a factor in not selecting plaintiff, and Mildred West said no.

Doctor Crowe was asked on the witness stand if in a conversation with the captain of the basketball team on May 1, 1978, she stated to her, "Wouldn't you all like

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8/ Three of five members of the committee were over 40 years of age.

a younger coach, someone like Mary Ann Stanley?" Doctor Crowe denied she made such a statement and again stated age was not mentioned or considered. Plaintiff was recalled to contradict Doctor Crowe, and said she had overheard such a statement. Though her testimony in rebuttal was somewhat different from his discovery deposition, that is not the question. The Court charged the jury that plaintiff's testimony in that regard went only to the credibility of Doctor Crowe's testimony, and was not substantive evidence that such a statement was made.

It is true, however, that plaintiff said that after the new coach had been selected she had a conversation with Mildred West in which Mrs. West gave her three reasons why Wetters had been selected, first because she was more qualified, she had played intercollegiate basketball within the last few years, and the faculty

felt the team would not progress as well under plaintiff as they would under a younger coach.

Clearly, the jury nor the Court can substitute its judgment for that of the person or body charged with making the choice between two applicants for a position. In a case such as this Plaintiff has the burden to prove, not that age was a factor, but that "age was the determining factor," and "to find that age was a factor that affected the decision is not equivalent to finding that age was a determing factor," and "proof that it was a determining factor is . . . essential to recovery under the ADEA." Leob v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). The prohibition under the Act is taking adverse action "because of" a worker's age. 29 U.S.C. § 623. In order for "plaintiff to prevail (s)he had to prove by a pre-

ponderance of the evidence that her [his] age was the 'determining factor' in her [his] discharge in the sense that, 'but for' her [his] employer's motive to discriminate against her [him] because of age, she [he] would not have been discharged." Leob v. Textron, supra, p. 1019. See also McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282, 96 S.Ct. 2574, 2580, Note 10, where the Court said the proof must be "a 'but for' cause." Leob v. Textron, Inc., supra, made plain that the issue is whether or not the choice between plaintiff and Wetters was made because of plaintiff's age, for "Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age." p. 1016. Whenever the evidence, as it is in this case, is "such that it is without contradiction that the College [company]

in fact was forced simply to choose one person [man] over another and that the choice was not at all tainted with the impermissible criteria of age - then the District Court would be correct in directing a verdict for the defendants [appellee] at the end of all of the evidence." Wilson v. Sealtest Foods Division of Kraftco Corp., 501 F.2d 84, 86 (5th Cir. 1974).

A plaintiff may establish a prima facie case under the ADEA by showing litigant is within the protested age group, met the applicable job classifications, that despite these qualifications litigant was rejected, and that but for litigant's age litigant would have been employed. Such "a prima facie showing is rebutted if the employer shows a legitimate non-discriminatory reason for the" employer's failure to select. Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980). See also

Loeb v. Textron, Inc., supra; Cova v. Coca-Cola Bottling Co., 574 F.2d 950 (8th Cir. 1978). "After the employer has come forward with such evidence, the ultimate burden of persuasion remains upon plaintiff to show that age was a determining factor...." Smith v. Flax, supra. It is a question for the jury if there is evidence which "would support a finding that age was a determining factor." Id. The fact that plaintiff may testify she is competent is not the issue, for plaintiff's "perception of herself [himself], however, is not relevant; it is the perception of the decision maker which is relevant." Id.

We are not here dealing with a person discharged from employment. The position was a new opening. Plaintiff had been employed for the 1977-78 term. Hers was "a temporary, restricted appointment which did (does) not carry fringe benefits."

Letter of Employment (Defendants' Exhibit 4). She was an applicant as were some eighty-eight others. Plaintiff's complaint is that she was not selected over the other applicants, and that a failure to select her was due to her age. An employer "may meet this burden by showing that the failure to select (discharge) was 'for good cause,' 29 U.S.C. § 623(f)(3), or by showing that the failure to select (discharge) was 'based on reasonable factors other than age,' 29 U.S.C. § 623(f)(1)." Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959-60 (8th Cir. 1978). The "Act does not require that advanced age and substantial length of service entitle employees to special favorable consideration; it requires merely that an employee ...not be the subject of discrimination because of...age." Id. In an ADEA case, the plaintiff has "the burden of persuading the trier of fact that his rejection

was a 'discriminatory decision.' " Loeb v. Textron, Inc., supra, p. 1015. Plaintiff must "demonstrate by competent evidence that the presumptively valid reasons for her (his) rejection were in fact a cover-up for a racially discriminatory decision." McDonnell Douglas Corporation v. Green, 411 U.S. 792, 807, 93 S.Ct. 1817, 1826 (1973). A mere reference to age is not sufficient to establish a right to recovery. It must have been a determining factor, and plaintiff must establish "but for" the age, she would have been selected. The evidence falls far short of meeting this standard. There is no dispute of any substantial fact and therefore no support for a verdict showing "but for" age plaintiff would have been selected.

The plaintiff's case is based solely on the plaintiff's testimony that she was told by Mrs. West that one of the three reasons Wetters was selected over her was

the faculty felt the team would not progress as well under plaintiff as they would under a younger coach. The statement is denied by Mrs. West and it is not consistent with the testimony of Carolyn Edwards. the newspaper reporter who testified that Mrs. West, in response to her inquiry, said age had nothing to do with the selection. But assume Mrs. West did make the statement, that does not establish any right to recovery. It must be shown that age was a factor. First, Mrs. West was only one member of a five member selection committee, and one of some 15 or more faculty members who unanimously voted on the selection. Second, there is no doubt that plaintiff was not the best qualified applicant. Third, the evidence fails to show age was a consideration or factor and that "but for" her age, plaintiff would have been selected. In Orr v. Frank R. MacNeill & Son, Inc., supra,

though dealing with differential in pay because of sex, the evidence of discrimination was grounded in the statement made by Frank R. MacNeill that his son had said he would not pay a woman as much as he paid a man. In reversing the District Court's finding of discrimination the Court said the "facts show that the salary differences were based upon other reasons than the conjecture of MacNeill senior that MacNeill junior wouldn't pay a woman as much as a man." [page 171]. That is the situation here. The evidence establishes without question that the selection of Wetters over plaintiff was based on qualifications. The defendant has shown a legitimate non-discriminatory reason for not selecting plaintiff. All that defendant has to do is "articulate some legitimate non-discriminatory reason," not "prove absence of discriminatory motive." Board of Trustees of Keene State

College v. Sweeney, _____U.S._____, 99 S. Ct. 195 (1978). This the evidence establishes. There is but one verdict the evidence would support on this issue. Plaintiff has not carried her burden.

C.

In her third claim plaintiff asserts her constitutional rights were violated, in that she was not given twelve months notice that she would not be rehired, in violation of the College handbook and regulations. At all times during plaintiff's employment at the College she served under "a temporary restricted appointment," which did not carry fringe benefits. Defendants' Exhibit 4. In fact, her employment was not for the same position or classified the same for each of her periods of service. Her contract for 1974-75 was Administrative Assistant for Intramural Sports; for 1975-76, Director of Women's Intramural Programs, during

which period she was Women's Junior Varsity Basketball Coach; 1976-77, Acting Instructor of Physical Education for the full semester 1976-77 - September 1, 1976 to January 15, 1977; and 1977-78, Intramural Director, Women's Basketball Coach and Bowling Instructor. At the time of her termination she was a part-time instructor and coach.

As is set out above, in early 1978 the College determined to create four new positions and make the position of Women's Basketball Coach a full-time job, with some additional duties. It duly advertised for applicants. Plaintiff filed her application, but was not selected. Not having been selected, she filed this action under 42 U.S.C. § 1983, claiming a violation of her constitutional rights. She asserted that she had not been given twelve months notice of an intention not to renew her contract of employment. Plaintiff's reply

memorandum opposing defendants' motion for judgment n.o.v. in paragraph III sets forth -

> The plaintiff admits that she was not tenured. As Judge Clarke points out in his Memorandum and Order,9/ this fact in itself means that plaintiff had no rights arising from the Constitution itself relating to due process. However, the Faculty Handbook [Plaintiff's Exhibit #2] could be considered to grant plaintiff a property interest in her employment by virtue of the procedures set forth therein.

Judge Clarke ruled the question was one of fact. Throughout the period 1974 to 1978, plaintiff was paid as a part-time employee, except for the period between September, 76 through January 15, 1977. Judge Clarke held in his opinion of July 1980, that "plaintiff had no right to notice and a hearing arising from the Constitution... her employment did not amount to a

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9/ Opinion and Order of Judge J. Calvitt Clarke of July 29, 1980, filed July 31, 1980, in this action, ruling on motion for summary judgment.

'property' interest in continued employment sufficient to trigger these constitutional protections." Page 6 of Clarke Opinion. He found and the plaintiff in her brief agrees, she relies on the provisions of the Handbook for her claim she is entitled to a twelve months notice that she will not be reemployed. Further, he held that the issue of whether plaintiff came within the provisions of the Handbook "is a factual matter which must be resolved at trial." Clarke Opinion page 7.

This action was prosecuted against Doctor Graves and Mrs. West, the President and Chairperson of the Women's Department of Physical Education, respectively, of the College. It has already been determined, and is not an issue here, that the College is not sueable under this Count. The jury found there was no liability on Doctor Graves, but found against Mrs.

West for a failure to give twelve months notice of an intention not to rehire. There is absolutely no evidence Mrs. West had anything to do with the execution of the contract for the hiring of plaintiff for the 1977-78 season. She is not the one who sent the notice to plaintiff that she had been selected for employment. The notice and terms of the contract were sent by Jack Edwards, Dean of the Faculty of Acts and Sciences. Plaintiff sent her acceptance to Edwards, and not West. Nor is there any suggestion in the evidence Mrs. West was the one having any responsibility to give a notice, even if one is required. Without such evidence, there is no basis upon which liability could be fixed on Mrs. West.

Judge Clarke had already found, and plaintiff agreed "that the plaintiff had no right to notice and a hearing arising from the Constitution itself," and "her

tentative and restricted employment did not amount to a 'property' interest in continued employment sufficient to trigger these constitutional protections." (Opinion of Judge Clarke, page 6]. Further, Judge Clarke ruled that whether plaintiff fell in the class of persons referred to in the Handbook was a factual matter which should be resolved at trial.

The only evidence at trial on the issue was the testimony of Doctor Graves, the President of the College. He testified that temporary and restricted employees were hired for the specific periods of their contracts, and did not obtain fringe benefits enjoyed by other faculty members;[10/] that they were not in the classification of tenured or probationary employees; and that temporary and restric-

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10/ The letter contract set forth this fact.

ted employees were not covered by the tenure, probationary and notice provisions of the Handbook. There was no evidence to the contrary. Plaintiff admits she was not tenured, nor entitled to any of the benefits of tenure, and did not understand the tenured system. She knew the position which she held for 1977-78 was being abolished, and a new position created. She made application for the new position. She was well aware that if she was selected for the new position, she would not be reemployed for the 1978-79 school year in her old position. Hence, she had not considered herself subject to the notice provisions of the Handbook, for she never gave notice if she was selected for the new position, she could not serve in the old position. Inasmuch as she agrees she had no constitutionally protected property right, even if she is included in the notice provisions

of the Handbook, and the College breached that condition, her only claim would be a state cause of action for breach of contract action against the College. The College being a state agency, and any action by Mrs. West being in her official capacity, she would not be personally liable under the evidence in this case. While the provisions of the Handbook "may create a right of action in the State Courts, it does not establish a property interest under the Fourteenth Amendment," for "every disagreement between a public employee with his employer over matters of state law or the terms of his contract does not reach constitutional proportions." Sigmon v. Poe, 564 F.2d 1093, 1096 (4th Cir. 1977). See also Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 283 (1977); Berry v. City of Portsmouth, 562 F.2d 307 (4th Cir. 1977). Section 1983 does not provide a remedy for common

law torts. Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974).

To recover damages under § 1983, plaintiff has the duty to show a violation of the 14th Amendment and involvement by the State. Great American Federal Savings & Loan Asso. v. Novotny, _____U.S._____, 99 S.Ct. 2345, 2355 (1979), concurring opinion of Justice Stevens.

Plaintiff has grounded her claim in Count III in § 1983. To recover against Mrs. West under § 1983, plaintiff must show "personal involvement of Mrs. West ...(and) in the absence of such personal involvement...(she) is not liable under § 1983." Vinson v. Richmond Police Department, 567 F.2d 263, 265 (4th Cir. 1977) [vacated on other grounds, 438 U.S. 903, 98 S.Ct. 3120]. See Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598. The dissenting opinion in Rizzo said that the Court there asserts that "a state official is not sub-

ject to the strictures of 42 U.S.C. § 1983 unless he directs the deprivation of constitutional rights." 96 S.Ct. 610, 423 U.S. 384. If the failure to give notice was negligence, an action therefor is not maintainable under § 1983, for § 1983 covers wilfull violations.

Further, Mrs. West has pled good faith. The evidence establishes that the College has interpreted the provisions of the Handbook regarding notice as not applying to persons like plaintiff. This was the policy set by the President. Mrs. West was therefore following the policy established by the College, and therefore acting in good faith. No evidence to the contrary was shown. She is therefore not liable in damages under § 1983. Procunier v. Navarette, 435 U.S. 555, 98 S.Ct. 855 (1978).

It is not here intended to make a determination of any rights the plaintiff

may have against the College for any alleged breach of contract. What is held is that there is no cause of action proven against Mrs. West under § 1983.

III

Plaintiff has asked for the allowance of counsel fees. However, to be entitled to the recovery of counsel fees, plaintiff must prevail on, at the least, some of her claims. She has not prevailed, and therefore is not entitled to recover counsel fees.

The verdict of the jury is set aside and the judgment previously entered thereon is vacated, and judgment is entered for defendants.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
December 15, 1980

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1124

Eloise A. Jacobs,

Appellant,

v.

College of William and Mary, an agency of the Commonwealth of Virginia;
Thomas A. Graves, Jr., President, College of William and Mary;
Mildred B. West, Head, Department of Physical Education for Women, College of William and Mary;

Appellees.

Appeal from the United States District Court for the East District of Virginia, at Newport News. Richard B. Kellam, District Judge.

Argued June 3, 1981

Decided June 19, 1981

Before WINTER, Chief Judge, RUSSELL and MURNAGHAN, Circuit Judges.

Robert M. White (White and Selkin on brief) for Appellant; Pamela A. Sargent, Assistant Attorney General (Marshall Coleman, Attorney General, Paul J. Forch, Assistant Attorney General on brief) for Appellees.

PER CURIAM:

Plaintiff, who was employed under a "temporary restricted appointment" by the College of William and Mary from 1974 to 1978, filed suit against the College, its president, and the chairman of the College's women's physical education department. She alleged that she had suffered sex discrimination in violation of 29 U.S.C. § 206(d)(1) in the amount of her salary vis-a-vis certain male employees of the College and age discrimination in violation of 29 U.S.C. §623 in the College's consideration of her application for the position of women's basketball coach, and that she was

denied due process when she did not receive proper notice that her contract would not be renewed after the 1978 school year. Following a jury verdict in plaintiff's favor in each of her three causes of action, the district court granted the defendant's motions for judgment notwithstanding the verdict.

Plaintiff appeals, arguing that there was sufficient evidence to support the jury's verdict. We are unpersuaded, and affirm for the reasons expressed in the district court's opinion. Eloise A. Jacobs v. College of William and Mary, et al., Civ. No. 79-133-NN (E.D. Va. Dec. 15, 1980).

AFFIRMED.

APPENDIX D

Pertinent References

a) Amendment XIV of the United States Constitution

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

b) 29 U.S.C. § 206(d)(1)

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such

payments made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex, provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

c. 29 U.S.C. § 623(a)(1)

It shall be unlawful for an employer—

(a) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

d. 42 U.S.C. § 1983 (prior to 1979 Amendment)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Opposition

Office-Supreme Court, U.S.
FILED
OCT 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-576

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELOISE A. JACOBS,

Petitioner,

v.

THE COLLEGE OF WILLIAM
AND MARY, etc., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	7
TABLE OF AUTHORITIES	3
STATEMENT OF FACTS	7
ARGUMENT	9
CONCLUSION	23
APPENDIX A	24

TABLE OF AUTHORITIES

	Page
Ball v. Board of Trustees of Kerrville Independent School District, 584 F.2d 684 (5th Cir. 1978), reh. denied, 588 F.2d 828, cert. denied, 440 U.S. 972 (1979).	21
Berenyi v. Immigration Director, 385 U.S. 630 (1967)	12
Board of Regents v. Roth, 408 U.S. 564 (1972)	20,21
Boehmer v. Penn R. Co., 252 U.S. 496 (1920)	12,18
Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962)	10
FTC v. Simplicity Pattern Co., 360 U.S. 55, reh. denied, 361 U.S. 855 (1959)	13,18
Gomez v. Toledo, 446 U.S. 635 (1980)	22
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)	12
Jackson v. Virginia, 443 U.S. 307 (1979)	10
Laugesen v. Anaconda Company, 510 F.2d 307 (6th Cir. 1975)	16
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)	17

TABLE OF AUTHORITIES (continued)

	Page
McDonnell-Douglas v. Green, 411 U.S. 792 (1973)	15
Marcoux v. Van Wyk, 572 F.2d 651 (8th Cir. 1978)	10
Perry v. Sinderman, 408 U.S. 593 (1972)	21
Pogue v. Retail Credit Co., 453 F.2d 336 (4th Cir. 1972), cert. denied, 409 U.S. 1109 (1973)	13
Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968)	10
Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967)	11
Smith v. Flax, 617 F.2d 1062 (4th Cir. 1980)	15
Sonzinsky v. United States, 300 U.S. 506 (1937)	14,18
Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981) ...	17
Texas Department of Community Affairs v. Burdine, ___ U.S. ___, 49 U.S.L.W. 4214 (March 3, 1981)	14,15
United States v. Johnston, 268 U.S. 220 (1925)	11

TABLE OF AUTHORITIES (continued)

Page

Wood v. Strickland, 420 U.S. 308 (1975) 22

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ELOISE A. JACOBS,

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THE COLLEGE OF WILLIAM AND MARY, etc., et al.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents, The College of William and Mary and Mildred B. West, respectfully request that this Court deny the petition for a writ of certiorari, whick seeks review of the Fourth Circuit's order in this case.

OPINIONS BELOW

The opinion of Judge Clarke (Pet. App. A) on Respondents' Motion for Summary Judgment is reported at 495 F.Supp. 183. The opinion of the District Court (Pet. App. B) is reported at 517 F.Supp. 791. The opinion of the Circuit Court (Pet. App. C) is unreported.

STATEMENT OF FACTS

The Respondents agree with Petitioner's statement of facts, with the following additions:

Petitioner's Masters degree is in guidance and counseling. The successful applicant's undergraduate and Masters degrees were both in physical education.

During the 1977-1978 school year, the following were the duties of Petitioner vis-a-vis the four males to whom she claimed equality:

Eloise A. Jacobs, Petitioner -

part-time, temporary restricted employee, 9 month contract (App. Vol. III, p. 778-780); direct women's intramurals program (App. Vol. III, p. 698); no recruiting (App. Vol. III, pp. 734-735, 764-767); answering perhaps 100 letters of inquiry (App. Vol. III, pp. 707-708); one voluntary fund-raising appearance (App. Vol. III, p. 768); taught 1 bowling course per semester (App. Vol. III, p. 170).

Bruce Parkhill, Men's Varsity Basketball Coach-

B.S. & M.Ed. in physical education (App. Vol. II, pp. 589-599, 622); full-time employee, 12-month contract (App. Vol. II, p. 596); 11 months per year involved in recruiting and scouting (App. Vol. II, p. 592); determine playing philosophy, evaluate talent, daily study halls, daily practice sessions, continue recruiting (App. Vol. II, pp. 592-597); view films of opposing teams (App. Vol. II, p. 619); engage in numerous fund-raising activities (App. Vol. II, p. 617-618).

2 Assistant Men's Varsity Basketball Coaches-

teach six hours per week (2 courses) (App. Vol. II, p. 584); 12-month contract, full-time employees (App. Vol. II, p. 596); assist Coach Parkhill in all duties noted above (App. Vol. II, p. 597).

Edward E. Jones, Men's Baseball Coach-

B.S. in physical education & M.Ed. with emphasis in Education Administration (App. Vol. II, p. 580); 12-month, full-time associate professor (App. Vol. II, p. 570); teaches both activities and majors courses 12-13 hours per semester (15-17 in-class hours) (App. Vol. II, p. 574); supervises Blow Gym and maintenance of the intramural fields (App. Vol. II, p. 576-577); men's intramurals director (unpaid duty) App. Vol. II, pp. 572-583).

ARGUMENT

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE CIRCUIT COURT CORRECTLY VIEWED THE EVIDENCE AND APPLIED THE PROPER STANDARD IN UPHOLDING THE DISTRICT COURT'S DECISION TO SET ASIDE THE JURY'S VERDICT.

It is noteworthy that the Petitioner does not contend that the trial Court, or the Circuit Court on appeal applied the wrong standard in setting aside the jury's verdict. The Petitioner contends for the first time in this Court that the wrong standard was used. The Respondents submit

the issue of the proper standard to be used in setting aside the jury verdict is not one of national importance; nor should the Petitioner receive a third assessment of the evidence from this Court.

The standard of review used by the appellate court was the same used by the trial court in deciding to grant a judgment notwithstanding the verdict. Marcoux v. Van Wyk, 572 F.2d 651 (8th Cir. 1978). The appellate court must give the party securing the jury verdict the benefit of all reasonable inferences to be drawn from the evidence. Jackson v. Virginia, 443 U.S. 307 (1979); Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962). However, a party is not entitled to the benefit of unreasonable inferences or those "...at war with the undisputed facts." Schneider v. Chrysler Motors Corp., 401 F.2d 549, 555 (8th Cir. 1968);

Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967).

The trial Court found that, viewing the evidence in the light most favorable to the Petitioner, reasonable persons could only have reached the conclusion that judgment for the Respondents was proper. Upon a review of the record, the Circuit Court adopted the District Court's view that the evidence and inferences were not only not in conflict, but in fact led inexorably to the conclusion that the jury's verdict must be set aside.

A grant of certiorari would be inappropriate since this court has held that it does not grant certiorari to review evidence and discuss specific facts, United States v. Johnston, 268 U.S. 220, 227 (1925). "...[A] Court of law, such as this Court is, rather than a court for correction of errors in fact finding,

cannot undertake to review concurrent findings of fact below in the absence of a very obvious and exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949); Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967). Petitioner now requests that this Court balance, for the third time in this case, the evidence presented, and scrutinize the consideration of the facts already given by the District Court and Circuit Court and already concluded twice against the Petitioner. This Court should not accept her invitation to embark upon a third minute review of the evidence. Boehmer v. Penn R. Co., 252 U.S. 496 (1920).

2. PETITIONER FAILED TO RAISE ANY OBJECTION TO THE DISTRICT COURT'S INSTRUCTION CONCERNING THE EMPLOYEE'S BURDEN OF PROOF

Petitioner's question presented is "What is the employee's burden of proof in

an age discrimination case?" It is important to note that the transcript of the trial reveals that Petitioner did not object to the trial court's instructions on this point.

Further, petitioner's three arguments in the Circuit Court of Appeals concerned whether there was evidence sufficient to support the jury's verdict on each of three counts in the complaint. (See Appendix A hereto). Since the issue was not raised in the Circuit Court, the question of the employee's burden of proof is not properly before this Court. FTC v. Simplicity Pattern Co., 360 U.S. 55, reh. denied, 361 U.S. 855 (1959). And, a party who fails to object to an instruction loses the right to assign it as error on appeal. Pogue v. Retail Credit Co., 453 F.2d 336 (4th Cir. 1972), cert. denied, 409 U.S. 1109 (1973). Petitioner's

409 U.S. 1109 (1973). Petitioner's contentions which she failed to assign as error in the Circuit Court of Appeals cannot now form the basis for certiorari. Sonzinsky v. United States, 300 U.S. 506 (1937). The instruction thus became the law of the case and Petitioner is bound by it.

3. THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS CONCERNING THE EMPLOYEE'S BURDEN OF PROOF IN AN AGE DISCRIMINATION CASE.

In its recent opinion of Texas Department of Community Affairs v. Burdine, ___ U.S. ___, 49 U.S.L.W. 4214 (March 3, 1981), this Court clearly stated the standard to be applied to an employee in an unlawful discrimination case. Although Burdine involved Title VII issues (42 U.S.C. § 2000e, et seq.), it provides guidance here since the required allegations, burdens of proof, etc., are

identical. Smith v. Flax, 617 F.2d 1062 (4th Cir. 1980).

In Burdine, this Court reaffirmed its earlier holding in McDonnell-Douglas v. Green, 411 U.S. 792 (1973), regarding the basic allocation of burdens. A plaintiff must first prove a prima facie case of discrimination by a preponderance of the evidence. A defendant must then "...articulate some legitimate, non-discriminatory reason for the employee's rejection." McDonnell-Douglas at 802.

> "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine at 4216.

The burden of proof on an employer, as discussed above, is to come forth with specific, articulated, non-discriminatory reasons for an employee's rejection. The burden is on the employee to prove either that the reasons are a pretext or that a discriminatory animus motivated the nonselection.

In this, an age discrimination case, Petitioner attempts to glean a difference between the standards used by the First, Fourth and Sixth Circuits concerning the issue of discriminatory animus. The Sixth Circuit in Laugesen v. Anaconda Company, 510 F.2d 307, 317 (6th Cir. 1975), recited the standard as follows:

> "[t]here could be more than one factor in the decision to discharge him and that he was nevertheless entitled to recover if one such factor was his age and if in fact it made a difference in determining whether he was to be retained or discharged." (Emphasis added).

The Fourth Circuit in Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981), endorsed the holding of the First Circuit in Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), which holds that proof that age was a determining factor is essential to recovery under the ADEA. The reference in Laugeson that age is a "determining factor" is the same as in Loeb. The sense of the phrase "determining factor" is that age is the factor "but for" which the alleged discrimination would not have occurred.

Thus, there is no difference among the First, Fourth and Sixth Circuits as to the proper standard. The trial court's instruction on this issue was drafted in accordance with these principles, was not objected to by the Petitioner, and became the law of the case.

4. "COMPARABLE WORTH" AS AN ISSUE IN AN EQUAL PAY ACTION WAS NOT RAISED BELOW

Petitioner admits that "comparable worth" was not raised in either the Circuit Court or the District Court. Since the courts below have not had an opportunity to make findings of fact and conclusions of law on such an important and complex point, it would be inappropriate for this Court to sit as a trial court de novo and enter into a minute review of the evidence. Boehmer v. Penn R. Co., 252 U.S. 496 (1920). This Court must reject Petitioner's invitation to rule on an issue not raised in her Complaint, at the trial court, in the appeal, or at any time previously. FTC v. Simplicity Pattern Co., 360 U.S. 55, reh. denied, 361 U.S. 855 (1959); Sonzinsky v. United States, 300 U.S. 506 (1937).

5. PETITIONER HAD NO PROPERTY INTEREST IN HER EMPLOYMENT

Respondent admits that a college can create a property interest in employment by providing for advance notice of termination. However, the record in this case shows that Petitioner failed to present credible evidence that she was entitled to such notice. And, furthermore even if the Petitioner had shown a property interest she must still prove that, given a protected interest, she was denied due process. The Petitioner failed on both points.

The District Court held that the notice terms of the Respondent's Faculty Handbook created a triable issue. Dr. Graves, the College's President, testified that a part-time, temporary restricted position such as that held by the Petitioner is an appointment for a

period of one year only; that it does not carry with it the usual fringe benefits such as pension, hospitalization, etc.; and that it does not entitle an employee to notice rights prior to termination under the faculty handbook. (App. Vol. III--p. 848). In answer to this, Petitioner testified that she really didn't understand the tenure system but knew that the college considered her to be a part-time employee. (App. Vol. III--p. 785-786). The Petitioner admitted that she did not think she was on a tenure track but felt that her employment might lead to such a tenure-eligible position. (App. Vol. III--p.788).

A "property interest" does not exist where petitioner has only a unilateral expectation, an abstract need or desire for a benefit, such as notice before termination. Board of Regents v. Roth,

408 U.S. 564, 577 (1972). As a temporary, restricted, part-time employee without tenure or tenure eligibility, Petitioner has no Constitutionally protected property interest in employment and no right to the twelve months' notice prior to termination. Roth, supra; Perry v. Sinderman, 408 U.S. 593 (1972). Petitioner served at the will and pleasure of the College on term contracts of one year's duration. In such circumstances, the College was under no obligation to rehire her or even to provide her with the reasons for the decision to choose another. Ball v. Board of Trustees of Kerrville Independent School District, 584 F.2d 684 (5th Cir. 1978), reh. denied, 588 F.2d 828, cert. denied, 440 U.S. 972 (1979).

6. RESPONDENT WEST ACTED IN GOOD FAITH AND IS THUS IMMUNE FROM AN AWARD OF DAMAGES UNDER 42 U.S.C. § 1983.

As correctly noted by Petitioner, a public official is immune from an award of damages under 42 U.S.C. § 1983 unless she knew or reasonably should have known that actions taken in her official capacity would violate Petitioner's constitutional rights or if she acted maliciously. Wood v. Strickland, 420 U.S. 308 (1975). Petitioner introduced no credible evidence whatsoever of malice on the part of any of the defendants. The defendants alleged and proved their good faith. Gomez v. Toledo, 446 U.S. 635 (1980). Furthermore, this point is moot since there has been no finding in the case that any of the defendants violated the petitioner's constitutional rights.

CONCLUSION

Respondents therefore request that the decision of the Circuit Court be affirmed and the petition for certiorari be denied; and further, that this matter be remanded to the District Court for an award of costs and attorneys' fees.

RESPECTFULLY SUBMITTED,

THE COLLEGE OF WILLIAM AND MARY and MILDRED B. WEST RESPONDENTS

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APPENDIX A

PETITIONER'S STATEMENT OF THE ISSUES PRESENTED FOR REVIEW TO THE FOURTH CIRCUIT

I. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT COACH JACOBS WAS NOT RE-HIRED BECAUSE OF HER AGE (Count Two)?

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT COACH JACOBS WAS PAID LESS THAN A MALE COUNTERPART FOR EQUAL WORK (Count One)?

III. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT COACH JACOBS WAS DENIED DUE PROCESS IN NOT RECEIVING TWELVE MONTHS ADVANCE NOTICE OF HER TERMINATION AS PROVIDED IN THE FACULTY HANDBOOK (Count Three)?